Fenwick Elliott

THE A-Z OF DISPUTE RESOLUTION

15 May 2006

Victoria Russell

12TH ADJUDICATION UPDATE SEMINAR

1. Adjudication

Statutory Adjudication

1.1 The introduction of statutory adjudication was one of the key recommendations in the Latham Report (1994). Sir Michael Latham recommended that a system of adjudication should be introduced within all standard forms of contract, and further recommended that it should be 'underpinned by legislation', capable of considering a wide range of issues, and that the decision of the adjudicator should be implemented immediately.

Housing Grants, Construction and Regeneration Act 1996 ("the Act")

1.2 Under Part II of the Act a party to a construction contract is unilaterally given the right to refer a dispute arising under the contract to adjudication. This is purely a right, or entitlement, and not an obligation. The Act only applies to "construction contracts" which fall within the detailed definition of Section 104, which describes such a contract as:-

> "*an agreement with a person for any of the following:-*
>
> *(a) the carrying out of construction operations;*
>
> *(b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;*
>
> *(c) providing his own labour, or the labour of others, for the carrying out of construction operations.*"

This includes:-

> *"an agreement*
>
> *(a) to do architectural, design, or surveying work, or*
>
> *(b) to provide advice on building, engineering, interior or exterior decoration or on the laying out of landscape,*
>
> *in relation to construction operations."*

Contracts of employment are expressly excluded.

The "construction operations" must be carried out in England, Wales or Scotland.

1.3 "Construction operations" are further defined in Section 105 to include a wide variety of general construction related work ("*construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land*") together with a list of notable exceptions. The installation in buildings of such things as heating, lighting and air conditioning are included, as well as any preparatory work, including site clearance, earth moving and the erection of scaffolding, etc. Cleaning, both internal and external, carried out in the course of construction is also covered, as is painting or decorating the internal or external surfaces of any building. Specific areas of activity which are excluded from the application of the Act include the manufacture or delivery to site of building or engineering components or equipment, materials, plant or machinery, or components for systems of heating, lighting, air conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection.

1.4 One notable exception is a construction contract with a residential occupier, although sub-contracts will still be covered.

1.5 The provisions only apply where the construction contract is in writing. (See paras 1.18 to 1.23 below)

1.6 Section 108 sets out the minimum requirements for an adjudication procedure which must now be included in every construction contract (as defined) in order to make it comply with the Act. These are as follows:-

"*(2) The contract shall*

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

(e) impose a duty on the adjudicator to act impartially; and

(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability."

The Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme")

1.7 If the construction contract does not comply with the above requirements then the Scheme will be implied into the contract and the Scheme's adjudication provisions will apply. Alternatively, if the construction contract does comply with the above provisions then the parties may include further more detailed provisions and

perhaps a procedure for enforcement. Essentially the parties can achieve compliance with the Act in one of four ways:

(i) adopt the Scheme;
(ii) adopt a standard form contract which sets out a series of adjudication rules;
(iii) adopt one of the alternative sets of rules, for example, the Institution of Civil Engineers Adjudication Procedure, the Construction Industry Council Model Adjudication Procedure or the Technology and Construction Solicitors Association Rules;
(iv) draw up their own set of bespoke rules.

Preliminary Points

1.8 A party contemplating reference of a dispute to adjudication must consider a number of preliminary points before proceeding. These include:

1. Is there a dispute?
2. Does the dispute arise under a construction contract within the meaning of Section 104?
3. Is the contract in writing within the meaning of Section 107?
4. What are the identities of the correct parties to the contract?

1.9 A party finding itself in the position of responding in an adjudication must pay particular attention to these issues in order to give itself the best possible chance of stopping the process from taking its full course.

<u>Is there a dispute?</u>

1.10 Under the Act, there is no entitlement to adjudicate unless a "dispute" has arisen "under the contract". A party may therefore challenge a purported reference to adjudication on the ground that there is no dispute. Similarly, enforcement of an Adjudicator's decision may be defended on the grounds that, in the absence of a dispute, the Adjudicator had no jurisdiction to make a decision and it is thus not binding on the parties.

1.11 The question of when a dispute crystallises has been examined in a large number of cases but there has unfortunately been some inconsistency in judicial analysis as to when the point of crystallisation occurs.

1.12 Judgments on the question of what constitutes a dispute for the purposes of statutory adjudication can mostly be assigned into one or other of two categories. The first category, the "narrow definition", is based on the proposition that for a dispute to arise, not only must a claim have been made but also the recipient of the claim should have been given reasonable opportunity to consider, and respond to, it. The second category, the "wide definition", consists of the cases in which the court in question has applied the proposition that there is a dispute once a claim is made, unless and until the defendant admits that the claimant is entitled to what has been claimed.

1.13 More recently, there has been "the flexible approach"[1], when Mr Justice Jackson, the judge in charge of the Technology and Construction Court, stated:

> "*1. The word "dispute" which occurs in many arbitration clauses and also in Section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.*
>
> *…*
>
> *3. The mere fact that one party (whom I shall call "the Claimant") notifies the other party (whom I shall call "the Respondent") of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.*
>
> *4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The Respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The Respondent may simply remain silent for a period of time, thus giving rise to the same inference.*
>
> *5. The period of time for which a Respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the*

[1] AMEC Civil Engineering Ltd -v- The Secretary of State for Transport [2004] EWHC 2339

claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the Respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. *If the Claimant imposes upon the Respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.*

7. *If the claim as presented by the Claimant is so nebulous and ill defined that the Respondent cannot sensibly respond to it, neither silence by the Respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.*"

1.14 The validity of contractual provisions imposing mandatory pre-adjudication procedures, for example stating that the parties are first to attempt to resolve any difference by mediation before being entitled to refer such difference to adjudication, has been considered in a number of cases[2]. Such contractual provisions have been held to be void, as they conflict with the unqualified right under Section 108(1) of the Act to refer a difference or dispute to adjudication "at any time" and thereby attempt to fetter a party's right to do so.

Does the dispute arise under a construction contract ?

1.15 The statutory right to refer a dispute to adjudication only arises under a construction contract falling within the definition of Section 104. Where the contract does not fall within this definition, there is therefore no right to statutory adjudication.

1.16 However, adjudication is also possible under a contract outside the statutory definition where the parties have as part of that contract agreed to refer disputes under it to adjudication. Sometimes parties agree to adjudicate after the dispute

[2] RG Carter -v- Edmund Nuttall Ltd (2000) TCC, John Mowlem & Co Plc -v- Hydra-Tight Ltd (2001) 17 Const LJ 358, British Waterways Board (Judicial Review) (2001) Court of Session

has arisen in circumstances where otherwise there would be no right to refer to adjudication or obligation to participate in it. This is referred to as "contractual adjudication", to distinguish it from statutory adjudication under the Act.

1.17 As it is "contractual adjudication", the Scheme cannot be implied to fill in any gaps in the adjudication procedures provided for in the contract[3].

Is the contract in writing?

1.18 Section 107(1) of the Act provides that the right to refer a dispute to adjudication applies only where the relevant construction contract is in writing. Sub-sections (2) to (6) contain the rules for determining whether the contract is in writing and were initially regarded as providing a fairly wide definition.

1.19 However, in the case of RJT Consulting Engineers Ltd -v- DM Engineering (Northern Ireland) Ltd[4], the Court of Appeal applied a much stricter interpretation.

1.20 At first instance, HHJ MacKay had taken what he described as a "purposive" approach and held that it was not necessary to identify all the terms of the contract and, since there was in this case a "comparatively great" amount of written material, that would be sufficient. The written material included a fee account, identifying the parties and the place of work, and meeting minutes, which identified the type of work being carried out.

1.21 The Court of Appeal disagreed with this approach. They said that invoices, for example, are evidence of the existence of a contract but do not define the contract as such. They held that the whole of the agreement had to be evidenced in writing, saying:

> "*Certainty is all the more important when adjudication is envisaged to have to take place under a demanding timetable. The adjudicator has to start with some certainty as to what the terms of the contract are. The written record of the agreement is the foundation from which a dispute may spring but the least the adjudicator has to be certain about is the terms of the agreement which is giving rise to the dispute.*"

1.22 A record of an agreement must thus be a record of a complete agreement.

[3] For other distinctions between these two types of adjudication, see the decisions of the Court of Appeal in Parsons Plastics (Research & Development) Ltd -v- Purac Ltd [2002] BLR 334 and Ferson Contractors Ltd -v- Levolux AT Ltd [2003] EWCA Cid 11

[4] [2002] 1 WLR 2344

1.23 It should be noted that one of the judges, Auld LJ, differed slightly in his view, considering that it was the terms of the agreement which were material to the issue(s) giving rise to the dispute which were important to be recorded in writing, not that every single term, however trivial, should itself be expressly recorded.

Identity of the parties

1.24 Care must be exercised to state the correct party names not only in the contract documentation but also in all exchanges during the adjudication process, as otherwise there may well be jurisdictional difficulties.

The Adjudication Process

1.25 The first step is to serve notice of adjudication, to inform the other party that a dispute has arisen and that it is intended to refer this dispute to adjudication.

1.26 The notice should set out in reasonable detail what the dispute is about, and the redress being sought; it establishes the jurisdiction of the Adjudicator, who will not be entitled to decide any issue not specifically stated in the notice. If a new issue emerges during the adjudication, this may well amount to a new "dispute" and could therefore be outside the Adjudicator's jurisdiction.

1.27 The next step is to appoint the Adjudicator.

1.28 An Adjudicator may have been named in the contract; if not, then the referring party has to apply to the adjudicator nominating body (ANB) named in the contract or, if none is named, an appropriate ANB for a nomination to be made.

1.29 The Adjudicator must be appointed, and the dispute formally referred to him/her, within seven days of the notice of adjudication.

1.30 Referral to the Adjudicator is achieved through service of the referral notice, which states the referring party's case. It should be supported by copies of, or relevant extracts from, the construction contract and all other documents, for example drawings, programmes, correspondence, meeting minutes, notices and calculations, upon which the referring party intends to rely by way of evidence to prove the events or support the assertions which it is claiming.

1.31 If the referral notice includes any documentation which the responding party has not seen before (other than witness statements) then the Adjudicator will not have

jurisdiction to consider it, as it will not have formed part of the "dispute" being referred to adjudication.

1.32 The responding party is entitled to serve a response to the referral notice, setting out its reply to the issues, arguments and facts relied upon by the referring party.

1.33 The Adjudicator may entitle the referring party to serve a reply to the response; in some larger and more complex adjudications, exchanges of submissions continue even beyond this point, with the service of rejoinders.

1.34 The Adjudicator may ask the parties questions, and may decide to hold a meeting at which the issues in dispute may be explored in full. He may decided to visit the site, or carry out tests, or obtain his own legal and/or technical expert evidence. In the exercise of all these powers, he must be careful to comply with the rules of natural justice, giving the parties the opportunity to comment on any information from whatever source upon which he wishes to rely in reaching his decision. He must not conduct the proceedings in such a way that would lead an outsider to conclude that that was or that there might be a risk of bias.

1.35 The Adjudicator must make his decision on the matters referred to him. If he cannot do this, then he should resign, thus allowing the parties to refer the dispute to someone else.

1.36 There is no format prescribed by the Act, the Scheme or any of the published adjudication procedures with which an Adjudicator's decision must comply. He should however make his decision responsive to the remedies sought, stating clearly what the parties are to do, and when it is to be done.

1.37 The Act does not require the Adjudicator to give reasons for his decision; whether he does so therefore depends on the contract, which may provide that he is to give reasons only if a party requests them. Many Adjudicators, however, now take the view that they should give reasons in any event, even if only briefly, in order to inform the parties of their thinking and engender greater acceptability of their decision and, perhaps, promote the final resolution of the dispute in a more efficient manner.

1.38 Generally, after making and publishing his decision, the Adjudicator has no power to review it to reflect any changes in his views on the merits of the dispute. He

may, however, revise his decision in order to correct clerical or other accidental errors[5]. The contract itself may also provide for this to be done.

1.39 Unless otherwise agreed by the parties, the Adjudicator has no power to award the payment of costs, other than to determine payment of his own fees and expenses, for which the parties are in any event jointly and severally liable.

1.40 If the Adjudicator's decision is not complied with, then it will be necessary to enforce it. The main methods of enforcing Adjudicators' decisions are:

1. Summary judgment/interim payment application in court.

2. Mandatory injunction.

3. Statutory demand/winding up proceedings.

4. Part 8 proceedings, where the declaration of the court is sought on a question that is unlikely to involve a substantial dispute over fact.

1.41 The principal grounds for challenging the decision of an Adjudicator include:

1. The Adjudicator did not have jurisdiction to make the decision.

2. The Adjudicator acted in breach of the requirements of natural justice/impartiality/ fairness.

3. The Adjudicator acted in breach of the applicable procedural rules, thereby going outside his jurisdiction.

4. The decision is wrong on its merits.

5. The paying party is entitled to set-off/abatement against the amount ordered to be paid.

6. The payee, by reason of insolvency, will be unable to repay the payment ordered when final determination of the dispute requires such payment.

7. The enforcement proceedings should be stayed to arbitration.

[5] Bloor Construction (UK) Ltd -v- Bowmer & Kirkland (London) Ltd [2000] BLR 314

The most common grounds are 1, 2, 3 and 6 but even they very rarely succeed.

1.42 The principal advantages and disadvantages of adjudication are as follows:

1. Advantages

- Cost
  Inevitably, the scope for detailed and therefore expensive preparation should be curtailed by the tight timetable. Costs will be lower, therefore, than in arbitration or litigation. They will however not usually be recoverable.
- Speed of redress
  The system provides a rapid means of obtaining an enforceable decision and payment of sums due. The courts are prepared to support the Act by providing speedy summary judgment when required to enforce an Adjudicator's decision.
- Privacy
  In contrast to court hearings which are in public and can be reported in the press and law reports, any adjudication hearing will be in private. This will not, however, be the case when it comes to enforcing an Adjudicator's decision; court judgments in enforcement hearings are sometimes reported.
- Keeps the project going.
  One of the principal purposes of the Act was to ensure disputes could be resolved while work continued on site and that the disruption caused by insolvencies, particularly those downstream, would be reduced by encouraging prompt payment.

2. Disadvantages

- Unsuitable (sometimes) for complex cases
  The timetable may be too short for many disputes, such as large and complicated final account disputes, although this is often dealt with by a larger dispute being broken up into several smaller issues or, alternatively, the parties agreeing a longer period in which the Adjudicator may reach their decision.
- Ambush
  The defending party may be taken by surprise but as an Adjudicator has to comply with the principles of natural justice, ambush is normally

dealt with by the Adjudicator ensuring that they have a reasonable time to reply to the Referral Notice and are therefore not prejudiced.

- Insolvency

  A party who pays money in compliance with an Adjudicator's decision may be unable to recover it, if he successfully reverses the decision in subsequent proceedings but in the meantime the recipient of the payment has become insolvent. See, however, the principles firmly laid down by HHJ Coulson QC in *Wimbledon Construction Company 2000 Ltd –v- Vago*[6].

2. Arbitration

2.1 Arbitration is a method of private dispute resolution in which the parties to the dispute agree to have it settled by an independent third party and to be bound by the decision he/she makes.

2.2 Providing arbitrators stay within the law, there is generally no appeal from the arbitrator's award, and the award may be enforced by the courts if necessary.

2.3 Arbitration is essentially a process which is available as an alternative to litigation. The parties must agree to submit their dispute to arbitration.

2.4 The advantages of arbitration are well rehearsed and include:

- Flexibility;
- Economy;
- Expedition;
- Privacy;
- Confidentiality;
- Freedom of choice of Arbitrator, and
- Finality.

2.5 On the other hand, the disadvantages of arbitration appear to have been on the increase. In comparison to litigation, where the judge and court facilities are provided at public expense, the parties to an arbitration will ultimately have to bear the costs of the Arbitrator and the meeting room and other facilities. Where, as is often the case in construction, more than two parties are involved in a dispute there is relatively little statutory power to consolidate the actions in one

[6] [2005] EWHC 1086

arbitration. Some standard forms of contract provide for consolidation in limited circumstances.

The Arbitration Act 1996

2.6 The following main objectives underlie the Act:

1. To ensure that arbitration is fair, cost-effective and rapid;
2. To promote party autonomy, in other words to respect the parties' choice;
3. To ensure that the courts' supportive powers are available at the appropriate times, and
4. To ensure that the language used is user friendly and clearly accessible.

2.7 Section 1 provides as follows:-

> "*(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;*
> *(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;*
> *(c) in matters governed by this Part the court should not intervene except as provided by this Part."*

2.8 Although it was anticipated that the Act would herald a new era in arbitration practice, many of its provisions remain under-used. In contrast to the Civil Procedure Rules of the courts, the Act's provisions are not all mandatory; arbitration remains a matter of private contract and therefore susceptible to party, lawyer and arbitrator conservatism. In addition, there is a sharp decline in the number of cases being referred to arbitration, partly due to the dissatisfaction with pre-1996 arbitration, which has led to arbitration clauses in contracts still being struck out as a matter of course, but principally due to the impact and great success of adjudication.

2.9 However, at a practical level, the increasing complexity and range of disputes referred to adjudication has led to some problems, particularly where Adjudicators have lacked the skill or experience to deal with complex claims, for example extension of time claims which require planning and programming expertise, or money claims which require forensic accounting skills. Unless extended, the statutory 28 day period may simply be too short properly and fairly to deal with the

points in issue. Further, the parties' costs in adjudication are almost always irrecoverable, unless otherwise agreed, and significant.

2.10 Arbitration is therefore now beginning to enjoy something of a comeback, particularly if based on the 100 Day Arbitration Procedure, championed by the Society of Construction Arbitrators and launched by them on 1 July 2004. This process is designed to act as a halfway point between adjudication and arbitration and is likely to gain significant momentum in the coming years.

The 100 Day Arbitration Procedure

2.11 Where the parties and the appointed arbitrator agree to adopt this procedure, the arbitrator has an overriding duty to make his award deciding all matters submitted to him (excluding liability for costs) within 100 days from either:-

(a) The date on which the statement of defence (or defence to counterclaim, if there is one) is delivered to him or to the other party (whichever is later); or

(b) If the statement of defence (or defence to counterclaim) has already been delivered, from the date on which the arbitrator gives his direction. This is normally within 7 days of the arbitrator's appointment, or of the adoption of the 100 Day Arbitration Procedure.

2.12 The Rules for the 100 Day Arbitration Procedure can be found on the Society of Construction Arbitrators' website, www.arbitrators-society.org. They prescribe a tight timetable for service of pleadings, documents and witness statements and provide that any hearing(s) should not exceed 10 working days. The arbitrator is to make his award within 30 days of the end of the hearing(s).

2.13 In order to achieve the time limits, the arbitrator is given power to order any submission or other material to be delivered electronically, and to limit or specify the number of witnesses and/or experts to be heard orally. He may conduct the questioning of witnesses or experts himself and can require two or more witnesses and/or experts to give their evidence together.

2.14 The parties "*agree to co-operate and to take every opportunity to save time where possible*".

2.15 They may agree to extend the period of 100 days, but the arbitrator has no such power other than by applying to the court.

2.16 Unless they agree otherwise, the parties "*shall make simultaneous submissions on costs to the arbitrator within 14 days of the date that the Award is published and the arbitrator shall make his Award on costs within 14 days of receipt by the arbitrator of the submissions*".

2.17 The 100 Day Arbitration Procedure includes a standard adoption clause which provides that the parties, by entering into an agreement to adopt the 100 Day Arbitration Procedure, "*further agree not to refer or continue to refer to Adjudication any dispute falling within the matters to be referred to Arbitration above until the Arbitrator has delivered his Award on the matters referred to him*".

2.18 This is not the first or only short form of arbitration. The ICC Rules require awards to be delivered within 6 months of signing Terms of Reference, and the Construction Industry Model Arbitration Rules (CIMAR) allow for "*Documents Only*" and "*Short Hearings*" procedures. Where it does differ is that it provides a detailed structure for the arbitration procedure, effectively giving a framework for the arbitrator's procedural directions. However, it is important to bear in mind that the 100 day period only starts to run once the statement of defence, or defence to counterclaim, if there is one, has been served, so to this extent, "100 days" is something of a misnomer: the parties may take as long as the arbitrator is prepared to allow to serve their pleadings.

The Process of Arbitration

2.19 The process of arbitration comes under four main headings:

- the agreement to arbitrate
- the Arbitrator
- the procedure
- the award and enforcement.

The Agreement to Arbitrate

2.20 Parties can agree to arbitrate once a dispute has arisen, or more commonly they may agree to refer future disputes to arbitration, should the need arise.

2.21 Section 6(2) provides that "*the reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an*

arbitration agreement if the reference is such as to make that clause part of the agreement." This resolves a frequently encountered problem in the construction industry. The case of *Aughton Limited –v- M.F. Kent Services Limited*[7] held that merely referring to a standard form contract which contained an arbitration clause did not amount to an agreement to arbitrate. The parties needed to include a written agreement to arbitrate in their primary agreement. Section 6(2) solves this problem.

2.22 An arbitration agreement must be in writing, but this is interpreted widely and includes any method of recording the agreement, such as electronically. In practice a detailed arbitration agreement is however recommended in order to avoid arguments over the validity of the agreement, and to provide a method of appointing an arbitrator and establishing the arbitrator's powers.

The Arbitrator

2.23 A variety of methods exist for the appointment of Arbitrators. An Arbitrator or Arbitrators may be appointed by agreement of the parties. Alternatively, the parties may have agreed that an institution such as the RIBA or RICS will appoint an Arbitrator on their behalf. Alternatively, the Court may appoint an Arbitrator. The most frequently used method in construction contracts is to provide a timescale within which the parties can agree the name of a sole Arbitrator, failing which either party may request that the president of a professional institution select and appoints an Arbitrator.

2.24 Section 33 of the Arbitration Act requires that the arbitral tribunal shall:

> "*(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and*
>
> *(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*"

This Section is mandatory. There is a corresponding mandatory duty imposed upon the parties to "*do all things necessary for the proper and expeditious conduct of the arbitral proceedings*" (Section 40).

[7] [1991] 57 BLR 1

2.25 The Arbitrator's dilemma is how to progress the arbitration and issue an award which deals with the matters in dispute whilst acting fairly and impartially between the parties. At the same time the Arbitrator must not exceed his or her powers but must observe the agreed procedures whilst dealing with all of the issues raised.

2.26 The Arbitrator obtains his or her powers from the agreement between the parties, the applicable rules and the Arbitration Act 1996. The Act provides the Arbitrator with wide ranging powers, all of which are subject to the agreement of the parties.

2.27 Section 38(1) states that:

> "*The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.*"

2.28 The balance of the section goes on to give examples of the powers that might be exercised, unless otherwise agreed by the parties, including the power to order a claimant to provide security for costs, and the power to inspect, photograph, preserve or take samples of any property being the subject of the proceedings.

2.29 Other sections of the Act contain specific powers. Unless otherwise agreed, the tribunal has the power to appoint experts, legal advisers or technical assessors; the parties are free to agree that the tribunal shall have power to make a provisional award, and the parties are free to agree that the tribunal shall, in the event of one party's failure to do something or delay, have the power to make peremptory orders and dismiss claims if that default continues.

The Procedure

2.30 Arbitration gets under way when one party sends the other a notice stating that a dispute has arisen between them and refers it to arbitration. If an Arbitrator has not been named in the contract, the party will also send a "notice to concur" in the appointment of an Arbitrator. If the parties are unable to agree on a Arbitrator then it is common for a professional institution to appoint one, although this can only be done if the parties have agreed that this mechanism is appropriate. Most commonly, a procedure for default appointment is included within the contract.

2.31 The arbitral tribunal decides on procedural and evidential matters, subject to the parties' agreement, including the exchange of pleadings, disclosure of documents, the application of the strict rules of evidence and whether or not the tribunal should take the initiative in ascertaining the facts and the law.

2.32 Arbitration rules may adopt one or more of the following three possibilities:

- procedure without a hearing (documents only);
- short procedure with a hearing; and
- full procedure with a hearing.

2.33 The procedure without a hearing anticipates that the Arbitrator will make an award based on documentary evidence only. The parties support their statements with a list of relevant documents together with copies of any documents upon which they rely. This procedure may be appropriate for disputes which are simple in nature. The time scales are short, allowing only 28 days for the entire process. The procedure is not frequently used; however, when it is used it is not uncommon for the parties to agreed to extend the time scale.

The Award and Enforcement

2.34 The Arbitrator's award is final and binding on the parties unless they have agreed to the contrary. The Act provides that the award may, with leave of the court, be enforced as if it were a judgment of the court. The ability for a party to challenge the award is extremely limited. On issuing the final award the Arbitrator becomes "functus officio". This means that the Arbitrator's duty and powers are at an end and save for minor corrections the Arbitrator is relieved of his task.

2.35 Frequently, the Arbitrator may make more than one award, each award dealing with different issues. These "partial awards" or "interim awards" could relate to a part of the claim or an issue which affects the whole of the claim (Section 47). An interim award is not provisional in nature but is final and binding with respect to the issues with which it deals. The benefit of interim awards is that a major issue can be dealt with by the Arbitrator as a preliminary point which dispenses with the need to spend time and money on related issues. The resolution of an important issue early in the proceedings may lead the parties to settle the whole of the dispute.

2.36 Should the parties settle the dispute, then the Arbitrator may issue a consent award which records the parties' agreement. Such an award is capable of enforcement in the courts. Unless the parties have agreed otherwise then the Arbitrator has the power to award a wide range of remedies:

- order payment of money;
- make a declaration of the rights between the parties;
- order a party to do or refrain from doing something;
- order specific performance; and/or
- order the rectification, setting aside or cancellation of a deed or document.

2.37 In addition, Section 49 of the Act provides that the Arbitrator can, unless otherwise agreed by the parties, award simple or compound interest. Rarely does the court have the power to award compound interest.

2.38 The arbitral tribunal also has power to award costs, and the power to cap or limit in advance the amount of recoverable costs in relation to the whole or part of the arbitration proceedings.

2.39 Under Section 69, leave to appeal from an Arbitrator's award will only be given in certain very limited circumstances. An appeal may only be on a question of law arising out of the award. The court must first be satisfied:-

> "*(3) (a) that the determination of the question will substantially affect the rights of one or more of the parties;*
>
> *(b) that the question is one which the tribunal was asked to determine;*
>
> *(c) that on the basis of the findings of fact in the award:*
>
> *(i) the decision of the tribunal on the question is obviously wrong, or*
>
> *(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and*
>
> *(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.*"

2.40 On an appeal, the court may:

- confirm the award;
- vary the award;
- remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
- set aside the award in whole or in part.

2.41 The parties may exclude the right of appeal by agreement. In domestic arbitration agreements, exclusion agreements are ineffective unless entered into after the commencement of the arbitral process.

3. Dispute Resolution Boards

3.1 A Dispute Resolution Board ("DRB") is a panel usually comprising three experienced, respected and impartial members.

3.2 The DRB is organised before construction begins, and will meet periodically on site.

3.3 It is usually formed by the Employer selecting a member for approval by the Contractor, the Contractor selecting a member for approval by the Employer, and with the two members thereby chosen selecting the third member, to be approved by the Employer and the Contractor. The three DRB members will then select one of them to act as chairman, again with the approval of the Employer and the Contractor.

3.4 Members of the DRB are provided with the contract documents and become familiar with the project procedures and the key players on the project. They are kept abreast of job progress and developments. They meet with representatives from the Employer and the Contractor during regular site visits and encourage the resolution of disputes at job level. The DRB process is designed to help the parties head off problems before they escalate into major disputes.

3.5 When a dispute flowing from the contract or the work cannot be resolved by the parties, then it can be referred to the DRB. The DRB will carry out a review which will usually include a hearing at which each party explains its position and answers questions. In arriving at their recommendation, the members of the DRB will consider the relevant contract documents, the correspondence and other documentation, and the particular circumstances of the dispute in question. The DRB will make a written, non-binding recommendation as to how the dispute should be resolved. This will include an explanation of the DRB's evaluation of the facts, the contract provisions and the reasoning which led to its conclusion.

3.6 The parties to the dispute will generally accept the recommendation of the DRB as they will have confidence in the technical expertise of the DRB's members and their first hand understanding of the project conditions.

3.7 DRBs have proved to be extremely effective; the process will work best if the contract provides for the admissibility of a DRB recommendation into any subsequent arbitration or legal proceedings.

3.8 According to the Dispute Resolution Board Foundation ("DRBF"), DRBs have been employed in over 1,200 projects just in North America alone, aggregating some $90 billion in construction cost. Roughly 1,500 DRB recommendations have been issued and, of these, nearly all have been adopted by the parties, thereby avoiding costly and time consuming arbitration or litigation.

3.9 The primary benefit of a DRB is therefore claim avoidance. The DRBF states, in the DRBF Practices and Procedures Manual, as follows:-

> "*The very existence of a readily available dispute resolution process that uses a panel of mutually selected, technically knowledgeable and experienced neutrals familiar with the project, tends to promote agreement on problems that would otherwise be referred to arbitration or litigation after a long and acrimonious period of posturing. Experience has demonstrated that the DRB process facilitates positive relations, open communication, and the trust and co-operation that is necessary for the parties to resolve problems amicably. There are several reasons for this result. The parties are reluctant to posture, by taking tenuous or extreme positions, because they do not want to lose their credibility with the Board members. In addition, since the DRB encourages the prompt referral of disputes and handles disputes on an individual basis, the aggregation of claims is minimised, thus avoiding an ever-growing backlog of unresolved claims which can create an atmosphere that fosters acrimony.*
>
> *The DRB encourages the parties to settle claims and disputes in a prompt, businesslike manner. During the periodic meetings the Board members ask about any potential problems, claims or disputes and review the status report of outstanding claims. The parties are led to focus on early identification and resolution of problems and, in the event of an impasse, use the DRB for prompt assistance. On many projects the parties resolve all potential disputes with none formally referred to the DRB.*
>
> *The DRB process has been found to be more successful than any other method of alternative dispute resolution for construction disputes. This process has experienced a very high rate of success in resolving disputes without resorting to litigation – the resolution rate is over 98% to date.*

Several unique factors account for this remarkable statistic. A DRB provides the parties with an impartial forum and an informed and rational basis for resolution of their dispute. The Board members have knowledge and experience with (1) the design and construction issues germane to the project, (2) the construction means and methods employed on the project, (3) the interpretation and application of contract documents, and (4) other processes of dispute resolution.

…

Cost savings actually begin with lower bids, including sub-contractor quotes, because of reduced risk of prolonged disputes. It is generally accepted that fair contracting practices result in lower bids because litigation contingencies are reduced. When a contract includes a DRB provision, prospective contractors know that if disputes occur, they will be considered expeditiously by a mutually selected panel of technically knowledgeable and impartial neutrals already familiar with the project. Thus, the risks of long delays and substantial risks are significantly reduced. In addition, earlier resolution means an earlier start to the payment process for contract modifications accepted by the owner.

From the owner's perspective, having a DRB on a construction project encourages ongoing dispute resolution, and does not leave them to the end of the project. This permits the owner to more closely control the budget and avoid the high expense and unpredictability of post-project litigation. In addition, a DRB recommendation documents the basis upon which the parties may reach resolution.

A DRB recommendation is especially helpful for public owners, because frequently the decision to accept settlement of a dispute must be approved by a governing board such as a school board, city council, county board of supervisors or other similar public governing board. A well reasoned analysis of the dispute by a panel of neutral professionals with construction backgrounds provides credibility to support the public owner's decision to accept the DRB recommendation."

3.10 DRB costs range from 0.05% of final construction contract cost, for relatively dispute free projects, to a maximum of 0.25% for difficult projects with disputes. Taking into account only projects which refer disputes to a DRB, or which have difficult problems, the cost ranges from 0.04% to 0.26%, with an average of 0.15% of

final construction contract cost, including an average of four dispute recommendations (statistics by the DRBF). The Employer and the Contractor will each pay 50% of the DRB costs, unless otherwise agreed.

3.11 Single adviser DRBs may be used on smaller projects.

3.12 Up until the end of 2004, DRBs had been used on approximately 1,200 projects in North America, with projects including state highways, court houses, libraries, prisons, sewer pipelines and tunnels, sewage treatment facilities, universities, medical centres, airports and hydro-electric projects.

3.13 DRBs are now becoming increasingly popular outside North America; the World Bank requires what they refer to as Dispute Boards to be used on all projects larger than $10 million.

3.14 Further information, including a copy of the DRBF Practices and Procedures Manual, may be obtained from the website of the DRBF, to be found at www.drb.org.

4. Early Neutral Evaluation

4.1 There are a number of forms of Early Neutral Evaluation ("ENE").

4.2 A Judge usually hears the core evidence from the parties or their legal representatives and then makes up their mind and gives an indication as to what the outcome would be, were the case to go to trial.

4.3 In larger cases, the Judge would be given the pleadings, experts' reports, agreed statements of issues and chronologies, together with a core bundle of the most essential documents, and an outline of each side's case. A hearing date for the Neutral Evaluation would then be set. At that hearing, each side would have say an hour to open their case and to respond to the other party's case and there would then be an hour during which the Judge could question the parties. The parties would be allowed to direct questions to each other, via the Judge.

4.4 There would then be what is sometimes called "a period of reflection" before the Judge made their assessment. Nothing that was said at the hearing could be used in any subsequent proceedings, or for any other purpose, and the Judge would be disqualified from further involvement in the proceedings, unless the parties agreed otherwise.

4.5 Normally, each party bears their own costs of an ENE.

4.6 Representatives of all parties capable of making decisions to resolve the dispute between the parties should generally be present at the hearing.

4.7 The ENE procedures which have been tried so far are generally regarded as reasonably satisfactory and economical, and cases often settle after an ENE has taken place.

4.8 An ENE may be offered by the Judge in the Technology and Construction Court who has responsibility for a particular case, if he feels that an ENE is likely to assist in the resolution of the matters in dispute. He can arrange to provide that evaluation himself, or to arrange for another Judge to do so.

4.9 The Judge providing the evaluation will not normally act as a mediator.

4.10 ENE is likely to assist parties in cases where there are one or few distinct issues on which preliminary views could be readily expressed without substantial presentation of the merits by each party. It is probably most appropriate where the parties' positions on particular issues have become defined and crystallised, and are only likely to be changed by the authoritative view of a third party. Such an authoritative view will only carry the necessary weight if all, or at least most, of the necessary material such as statements, reports, and documents are available to that third party, as it will only be then that the parties consider that they are able to put forward their best case on the issues in question, and cannot later argue that there was more evidence forthcoming which would alter the case in their favour. As with other successful uses of forms of Alternative Dispute Resolution, the timing is therefore critical. If an ENE takes place too early, before the parties have had sufficient time to exchange documents, reports and statements, they may still feel that they can improve their position and the evaluation may therefore not be successful. If an ENE is conducted too late, then it will of course not save the costs which it is designed to avoid.

5. Expert Determination

5.1 Expert determination is a process by which the parties to a dispute instruct a third party to decide a particular issue. The third party is selected because of his or her particular expertise in relation to the issue. Expert determination is essentially a creature of contract.

5.2 A typical expert determination clause should ensure that specific items are clearly dealt with. First, the issue or issues to be determined should be clearly and precisely expressed. Lack of clarity in relation to the issue(s) to be determined may provide an opportunity to argue subsequently about the jurisdiction of the expert. Second, it is important to state that the expert is to act as an expert and not as an arbitrator. Much of the case law in the area of expert determination focuses on this point. If the third party is acting as an expert, then his or her opinion in relation to the issue in dispute is not capable of being challenged. On the other hand, if the third party is acting as an arbitrator, then the formalities of an arbitration procedure must be adhered to.

5.3 A further essential feature of expert determination is therefore that the decision should be final and binding.

5.4 Finally, the contractual machinery should provide some mechanism for appointment of an appropriate expert. This would usually provide for appointment by agreement between the parties or in default by some appointing authority stated in the contract. In addition, it is beneficial to include express provisions in relation to the expert's qualifications and state how the expert is to be paid. Fees are usually split equally between the parties with a further provision allowing the expert to decide otherwise.

5.5 This dispute resolution technique lends itself to valuation and complex technical issues. In this respect expert determination may be found in a wide variety of circumstances: valuing shares in private companies, certifying profits or losses of a company during sale and purchase, valuing pension rights on transfer, determining market values in long term agreements. Further, the use of expert determination may be used as part of a multi stage dispute resolution procedure. Some technical matters may be referred to an expert, leaving the other issues in dispute to arbitration or litigation.

6. Litigation

6.1 The Courts provide the setting for the traditional mode of dispute resolution; namely, litigation. The number of disputes determined by the Courts is negligible, compared to the number of disputes settled by other means. Furthermore, very few proceedings which are commenced actually result in a trial and subsequent judgment. In excess of 90% of the actions started in the High Court are disposed of before reaching trial.

The Civil Procedure Rules ("CPR")

6.2 Lord Woolf published his Access to Justice report in 1999. He concluded that the existing system was too expensive, too slow, too fragmented, too adversarial, too uncertain, and utterly incomprehensible to most litigants. The aim of his review was to:

- improve access to justice and reduce the cost of litigation;
- reduce the complexity of the court rules and modernise terminology; and
- remove unnecessary distinctions, practice and procedures.

The Overriding Objective

6.3 Part 1 of the CPR sets out "the overriding objective", on the basis of which all rules must be interpreted. Essentially, the overriding objective is that all cases should be dealt with justly and in accordance with five basic principles that the court will adopt, namely:

- ensure that the parties are on an equal footing;
- save expense;
- deal with cases in ways which are proportionate to:
  1. the amount of money involved;
  2. the importance of the case;
  3. the complexity of the issue(s), and
  4. the parties' financial positions.
- deal with cases expeditiously and fairly; and
- allocate an appropriate share of the Court's resources to each case whilst taking into account the needs of other cases.

6.4 Judges now adopt a very proactive role in managing cases in order to ensure that the overriding objective is complied with. The management process will include:

- identifying the main issues at an early stage
- encouraging the parties to use ADR
- making appropriate use of IT
- attempting to deal with the case without requiring the parties to attend Court if possible (such as using telephone conference calls)
- ensuring the matter proceeds as fast as is sensibly possible.

6.5 More importantly, a party who engages in gamesmanship which the Court considers is other than in accordance with the overriding objective risks incurring severe cost penalties.

The Litigation Tracks

6.6 Cases are categorised under 3 main "tracks":

- small claims track
- fast track
- multi-track

6.7 The Court considers the statements of case of the parties and allocates the matter to a particular track. To a large extent this is based on the value of the case.

The Technology and Construction Court

6.8 The Technology and Construction Court (TCC) is the specialist Court of the construction industry, because civil engineering, building and environmental disputes form the most significant part of its work.

6.9 The types of claim which are brought in the TCC include:

1. Building and other construction disputes, including claims for the enforcement of adjudicators' decisions under the HGCRA;

2. Engineering disputes;

3. Claims by and against engineers, architects, surveyors, accountants and other specialised advisors relating to the services they provide;

4. Claims by and against local authorities relating to their statutory duties concerning the development of land or the construction of buildings;

5. Claims relating to the environment, for example, pollution cases, and

6. Challenges to decisions of arbitrators in construction and engineering disputes, including applications for permission to appeal, and appeals.

6.10 All claims allocated to the TCC are assigned to the multi-track. The case will be assigned to a named TCC judge, who will have primary responsibility for the case management of that case, and who, subject to the exigencies of the list, will be the trial judge.

6.11 There are full time TCC judges at Birmingham, Liverpool, London and Salford, and part-time TCC judges (in the sense that they take TCC work as and when required) in a number of courts in other parts of the country.

6.12 Proceedings cannot usually be instituted in the TCC without first complying with the requirements of the pre-action protocol for construction and engineering disputes (see paras 6.17 to 6.36 below).

6.13 The general approach of the TCC to case management is to give directions at the outset and then throughout the proceedings to serve the overriding objective of dealing with cases justly. The judge to whom the case has been assigned has wide case management powers, which will be exercised to ensure that:-

- the real issues are identified early on and remain the focus of the ongoing proceedings;
- a realistic timetable is ordered which will allow for the fair and prompt resolution of the action;
- costs are properly controlled and reflect the value of the issues to the parties and their respective financial positions.

6.14 One question that will be addressed at the first case management conference is expert evidence. Expert evidence must be restricted to that which is reasonably required to resolve the proceedings. The overriding duty of the expert is to help the court on matters within his expertise. The following points should be noted:

1. In deciding whether to give permission for an expert to give evidence, the court will require to be satisfied that:

   (a) the issues to which that evidence will go are a proper subject for expert evidence; and

   (b) expert evidence from the proposed witness is justified, having regard to the overriding objective of the CPR.

Parties will need permission to adduce expert evidence on issues which are either not the proper subject for expert evidence at all or peripheral to the central questions in the case.

2. The court will exercise rigorous control over the number of experts on whose evidence the parties may rely.

3. Where the court gives permission to the parties to adduce expert evidence, it will therefore usually specify the issues to which their evidence may relate. If an expert's report goes beyond that permission, the offending parts of the report are not likely to be admitted in evidence and costs sanctions are likely to follow.

4. The court will also want to explore with the parties at the first case management conference the possibility of making a direction for the use of single joint experts. The CPR do not specify the criteria for making such a direction; the court will, however, tend to favour the giving of such a direction in relation to issues which do not lie at the heart of the case and/or which are relatively uncontroversial and/or where the cost of expert evidence is disproportionate to the sum at stake in the case. Where the use of a single joint expert is contemplated, the court will expect the parties to co-operate in developing and agreeing, so far as possible, the terms of reference for the expert. In default of agreement, the court will define the terms of reference. In most cases, the terms of reference will detail what the expert is asked to do, identify any documentary material he is asked to consider and specify any assumptions he is asked to make.

6.15 At the first case management conference, the court will also usually deal with the question of witness statements, disclosure of documents, whether to make any order for the carrying out of inspections, a site view and the use of IT. The parties should carefully consider how the burden of preparing documents can be reduced by co-operation and the use of IT and in the TCC the IT protocol produced by the Technology and Construction Solicitors Association is often useful.

6.16 At the subsequent pre-trial review, the court will look at whether the previous directions have all been complied with and, if not, why not and, where necessary, will give any further directions that are required to ensure that the case will be ready to start on the day fixed for trial. The court will also give directions for the conduct of the hearing itself.

The pre-action protocol for construction and engineering disputes

6.17 The protocol applies to all construction and engineering disputes, including professional negligence claims against architects, engineers and quantity surveyors.

6.18 A claimant will be required to comply with the protocol unless the proposed proceedings:

- are for the enforcement of an adjudicator's decision under the HGCRA;
- include a claim for interim injunctive relief;
- will be the subject of a claim for summary judgment, or
- relate to the same, or substantially the same, issues as have been the subject of recent adjudication under the HGCRA or some other formal ADR procedure.

6.19 The objectives of the protocol are:

1. To encourage the exchange of early and full information about the prospective legal claims;
2. To enable parties to avoid litigation by agreeing a settlement of the claim(s) before commencement of proceedings; and
3. To support the efficient management of proceedings where litigation cannot be avoided.

6.20 The general aim of the protocol is to ensure that before court proceedings commence:

1. The claimant and the defendant have provided sufficient information for each party to know the nature of the other's case;
2. Each party has had an opportunity to consider the other's case and to accept or reject all or any part of the case made against him at the earliest possible stage;
3. There is more pre-action contact between the parties;
4. Better and earlier exchange of information occurs;

5. There is better pre-action investigation by the parties;

6. The parties have met formally on at least one occasion with a view to defining and agreeing the issues between them, and exploring possible ways by which the claim may be resolved;

7. The parties are in a position where they may be able to settle cases early and fairly without recourse to litigation, and

8. Proceedings will be conducted efficiently if litigation does become necessary.

6.21 The first step in the protocol is for the claimant, prior to commencing proceedings, to send to each proposed defendant a letter of claim which sets out:

1. A clear summary of the facts on which each claim is based;

2. The basis on which each claim is made, identifying the principal contractual terms and statutory provisions relied upon;

3. The nature of the relief claimed: if damages are claimed, a breakdown showing how the damages have been quantified; if a sum is claimed pursuant to a contract, how it has been calculated; if an extension of time is claimed, the period claimed;

4. Where a claim has been made previously and rejected by the defendant, and the claimant is able to identify the reason(s) for such rejection, the claimant's grounds of belief as to why the claim was wrongly rejected; and

5. The names of any experts already instructed by the claimant on whose evidence he intends to rely, identifying the issues to which that evidence will be directed.

6.22 Within 14 calendar days of receipt of the letter of claim, the defendant should acknowledge its receipt in writing. If there has been no acknowledgment by or on behalf of the defendant within 14 days, the claimant will be entitled to institute proceedings without further compliance with the protocol.

6.23 If the defendant intends to object to all or any part of the claimant's claim on the grounds that:

1. The court lacks jurisdiction,

2. The matter should be referred to arbitration, or

3. The defendant named in the letter is the wrong defendant.

then that objection should be raised within 28 days after receipt of the letter of claim.

6.24 Otherwise, the defendant shall within 28 days from the date of receipt of the letter of claim, or such other period as the parties may reasonably agree (up to a maximum of 4 months), send a letter of response to the claimant, identifying:

1. The facts set out in the letter of claim which are agreed or not agreed, and if not agreed, the basis of the disagreement;

2. Which claims are accepted and which are rejected, and if rejected, the basis of the rejection;

3. Whether the defendant intends to make a counterclaim, and if so, giving the information which is required to be given in a letter of claim;

4. The names of any experts already instructed on whose evidence it is intended to rely, identifying the issues to which that evidence will be directed.

6.25 If no response is received by the claimant within the 28 day period, or such other period as has been agreed, the claimant shall be entitled to institute proceedings without further compliance with the protocol.

6.26 The claimant shall provide a response to any counterclaim within the equivalent period allowed to the defendant to respond to the letter of claim.

6.27 As soon as possible after exchange of these various letters of claim/response/reply to counterclaim, the parties should normally meet.

6.28 This meeting is referred to as the pre-action meeting; its aim is for the parties to agree what are the main issues in the case, to identify the root cause of disagreement in respect of each issue, and to consider (i) whether, and if so how, the issues might be resolved without recourse to litigation, and (ii) if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective of the CPR.

6.29 The court will normally expect that those attending the pre-action meeting will include a representative of each party who has authority to settle or recommend settlement of the dispute, a legal representative of each party, if one has been instructed, and a representative of a party's insurer, where the involvement of insurers has been disclosed.

6.30 If the parties are unable to agree on a means of resolving the dispute other than by litigation, they should try to agree:

1. Whether, if there is any area where expert evidence is likely to be required, a joint expert may be appointed, and if so, who that should be, and (so far as is practicable);

2. the extent of disclosure of documents with a view to saving costs; and

3. the conduct of the litigation with the aim of minimising costs and delay.

6.31 Any party who attended a pre-action meeting is permitted to disclose to the court:

1. That the meeting took place, and when, and who attended;

2. The identity of any party who refused to attend, and the grounds for such refusal;

3. If the meeting did not take place, why not; and

4. Any agreements concluded between the parties.

6.32 Except as set out immediately above, everything said at the pre-action meeting is otherwise to be treated as "without prejudice".

6.33 If the parties do not comply with the requirements of the protocol, they may incur a costs penalty or sanction in any litigation proceedings.

6.34 The protocol is currently under review; a working party was set up in October 2005 to discuss how the protocol was currently working and how (if at all) it might be improved or modified. An interim report was produced in January 2006 which has been sent out as part of a consultation process. Two particular matters of concern are (1) the length of time which it may sometimes take parties to comply with the protocol, and the fact that there is no immediate sanction for delay, and (2) that if compliance with the protocol results in settlement, the costs incurred (which can be quite high) will not be recoverable from the paying party, unless otherwise agreed.

6.35 The pre-action protocol practice direction provides that:-

> "*4.7 The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.*"

6.36 The practice direction acknowledges that it is not practicable in the protocol "*to address in detail how the parties might decide which method to adopt to resolve their particular dispute*" but sets out some of the options, such as discussion and negotiation, early neutral evaluation by an independent third party, and mediation, which it describes as "*a form of facilitated negotiation assisted by an independent neutral party*".

7. Mediation/Conciliation

7.1 The origins of mediation and conciliation can be traced to China some 3,000 years ago. China was the first to use these techniques as a primary dispute resolution process whilst other parts of the world resorted to some form of adjudicative process. State courts were used as a mechanism to support socialist ideals and, as such, performed a controlling function with regard to activities considered as criminal. On the other hand, activities relating to commerce fell outside socialist

ideals, as did non-criminal matters relating to private individuals. The resolution of these disputes by informal processes was encouraged in order to maintain 'harmony' in the community.

7.2 During the past 20 years, there has been a growing international awareness of the benefits of mediation as a dispute resolution technique.

7.3 In the UK, the move towards mediation first developed in the area of family disputes. The commercial sector began to take an interest in the late 1980s and the Centre for Effective Dispute Resolution (CEDR) was formed in 1990 in order to promote ADR in business generally, primarily through mediation. Specifically in relation to the construction industry, the ICE established a conciliation procedure in 1988. More recently, the courts have piloted court based mediation schemes, such as that in the Central London County Court.

What are mediation and conciliation?

7.4 To mediate means to act as a peacemaker between disputants. It is essentially an informal process in which the parties are assisted by one or more neutral third parties in their efforts towards settlement. Mediators do not judge or arbitrate the dispute. They advise and consult impartially with the parties to assist in bringing about a mutually agreeable solution to the problem.

CEDR originally defined mediation as "*A voluntary, non-binding, private dispute resolution process in which a neutral person helps the parties try to reach a negotiated settlement*" but, after using this definition for nearly 14 years, updated it in the autumn of 2004, as follows:

> "*Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.*"

7.5 There are two common threads. Firstly, the form of the third party intervention. The primary role of the third party is to facilitate other people's decision making. The process builds on negotiation, and the mediator fundamentally sustains and reviews the situation with the parties. Secondly, the third party should be independent of the parties in dispute. The essence of mediation is that the mediator is impartial. The trust which develops during the process allows the mediator to perform "a bridging role" between the parties.

7.6 In the UK conciliation is usually taken to mean a more interventionist or evaluative style of mediation. However, there is no internationally agreed norm. The conciliation of labour disputes by ACAS is generally considered to be more evaluative, as is ICE conciliation. If the parties fail to settle under the ICE procedure, the conciliator will make a recommendation. However, the terms mediation and conciliation are often used interchangeably.

7.7 It is perhaps more useful to make a distinction between facilitative and evaluative techniques. The process can be facilitative in that the third party intermediary merely tries to aid communications between the parties. CEDR advocate a facilitative approach to mediation. At the other end of the scale is an evaluative approach where the third party comments and gives their views on the issues and makes recommendations as to the outcome.

7.8 The main elements of mediation and conciliation are therefore:

1. It is voluntary, in the sense that the parties participate of their own free will;

2. A neutral third party assists the parties towards reaching a settlement;

3. The process is non-binding unless an agreement is reached, and

4. The process is private, confidential and conducted without prejudice to any legal proceedings.

Benefits of mediation

7.9 Many consider that mediation and conciliation offer a range of benefits when compared to the traditional formal adjudicative processes such as litigation and arbitration. These benefits include:

- Reduction in the time taken to resolve disputes
- Reduction in the costs of resolving disputes
- Providing a more satisfactory outcome to the dispute
- Minimizing further disputes
- Opening channels of communication
- Preserving or enhancing existing business and/or personal relationships
- Empowering the parties, and giving them greater flexibility

The mediation process

7.10 There are, in general terms, three main phases to mediation:

1. Pre-mediation – agreeing to mediate and preparing for the mediation.

2. The mediation – direct and indirect mediation.

3. Post-mediation – complying with the outcome.

Pre-mediation

7.11 The preparation phase of mediation develops from the initial inquiry, which may involve an explanation of the process, and an attempt to persuade reluctant parties to participate. An "agreement to mediate" is frequently used in order to agree the terms and the ground rules for the mediation. This agreement will include items such as costs, confidentiality, the "without prejudice" nature of the mediation, authority to settle and timetable. In some instances, the parties may provide and exchange written summaries of the dispute, and supply copies of supporting documents. During this process, the mediator will be identified (either by agreement or by appointment), and will become a party to the mediation agreement.

7.12 From the mediator's perspective, the pre-mediation objective is merely to get the parties to the mediation. The strategy of the parties is less clear. Are they preparing their best case, or are they considering innovative ways to settle?

The mediation

7.13 Most commercial mediations are conducted over the course of a single day, although some may extend over several days, weeks, or even months. Mediations are usually conducted on neutral territory, rather than at the office of one of the parties. This is an attempt to avoid the power imbalances which may occur as a result of one of the parties operating within familiar territory. The mediator's role involves managing the process, and so he or she will receive and seat the parties, before carrying out the necessary introductions. During this first joint meeting, the mediator will establish the ground rules and invite the parties to make their opening statements.

7.14 The mediation process is flexible, and once the parties have made their opening statements, the mediator may decide to discuss some issues either in the joint meeting or in a "caucus". A caucus is a private meeting between the mediator and one of the parties. The mediator will caucus with the parties in turn, in order to explore in confidence the issues in the dispute and the options for settlement. In a caucus, the mediator is mediating indirectly with the parties. This exploration phase of mediation serves to:

- Build a relationship between the parties and the mediator;
- Clarify the main issues;
- Identify the parties' interests or needs;
- Allow the parties to vent their emotions;
- Attempt to uncover hidden agendas, and
- Identify potential settlement options.

7.15 While the mediator is caucusing with one party, it may be possible for the other party to work on a specific task set by the mediator. The mediator may also utilise further joint meetings in order to narrow the issues, allow experts to meet, or broker the final settlement. The aim of mediation is to develop a commercially acceptable, workable agreement which can be written into a binding settlement contract.

Post mediation

7.16 The post mediation phase will either involve execution of the settlement agreement, or a continuation towards a trial or arbitration hearing. The mediator may still be involved as a settlement supervisor. There may be a further mediation. Just because the parties do not settle does not mean that the mediation was not successful. The parties may have a greater understanding of their dispute, which may lead to future efficiencies in the resolution of the dispute, or the parties may settle soon after the mediation.

The mediator's role

7.17 The mediator is the manager of the process. S/he should take control of the mediation, and aid the parties to settlement. The mediator fulfils several important roles during the mediation and should:

- Manage the process firmly but sensitively;
- Facilitate the parties towards settlement by overcoming deadlock;

- Gather information in order to identify common goals;
- Be a reality tester, helping the parties to take a realistic view of the dispute;
- Act as a problem solver, thinking creatively in order to help the parties construct an outcome that best meets their needs;
- Soak up the parties' feelings and frustrations, re-channelling the parties' energy into positive approaches to the issues;
- Prompt the parties, and maintain momentum, towards settlement;
- Act as a scribe who assists in the writing up of the agreement, and
- Be a settlement supervisor, checking that the settlement agreement has worked and being available to help with any further problems that may occur.

7.18 It is vital that the mediator gains the trust and confidence of the parties so that a full and frank discussion can be encouraged. A full exploration of the problems will help to generate settlement options.

7.19 Mediators may employ a variety of strategies to achieve a settlement, including:

- Investigation - questioning (1) to obtain information and (2) to point out the weak areas and flaws in a particular party's point of view.
- Empathy
- Persuasion
- Invention - creating solutions
- Distraction - to stop parties from assuming a set position.

7.20 The mediator should question and investigate not just the issues in dispute, but also the underlying conflict. Mediators have little chance of steering the parties to a settlement without understanding the hidden objectives of the parties. They should avoid sympathy with either party. Nonetheless, a degree of empathy is required in order to build trust with the parties. Persuasion is required in order to drive the mediation forward, as is a degree of inventiveness and the ability to provide distraction. In this context, distraction refers to the ability to take the parties onto another related subject in order to explore settlement possibilities from another angle. This technique may be used to avoid the polarisation of positions which is frequently adopted by many during conflict.

The qualities of a mediator

7.21 A mediator is qualified not by virtue of his or her expertise in a particular area, but rather by the individual's ability to aid the parties to a settlement.

7.22 The skills or attributes required of a mediator in order to carry through a successful mediation are somewhat subjective. Many of the skills are the interpersonal skills of the individual, in particular his or her ability to communicate effectively. An effective mediator needs to be seen to maintain a carefully balanced neutral role. In some respects a mediator who has no specialist knowledge about the technical issues of a dispute will have the benefit of coming to the mediation without preconceived ideas arising from his or her own background. This contrasts with the skills expected of an arbitrator who is usually chosen for his or her particular area of technical expertise.

7.23 Although the courts cannot compel parties to mediate, if one party unreasonably refuses an offer by the other to do so, they may subsequently suffer a costs sanction by the judge in future proceedings.

8. Mini Trial/Executive Tribunal

8.1 The use of Mini Trials to resolve construction disputes is a fairly new and developing phenomenon. The Mini Trial originated in 1994 when Telly Credit took action against TRW, claiming an infringement on its patent rights. The action proceeded over a period of approximately two and a half years during which time the parties exchanged around 100,000 documents. In a bid to conclude the dispute, the parties agreed to an alternative process.

8.2 The lawyers for each party were given a limited time (4 hours each) in which to present their case to the senior executives of each company. The executives had authority to settle the dispute. Following the presentations, a further 2 hour time period was provided in order for the other side to reply and make a counter to the reply. The entire process lasted for two days. This meeting was moderated, or facilitated, by a neutral third party who in this case was a retired judge with patent law expertise. In the event that the parties could not settle, he had agreed to provide a non binding opinion. Apparently the executives were able to resolve the dispute in around half an hour of private meetings upon the conclusion of the presentations.

8.3 The process, which later became known as the "mini trial", can lead to savings in time and money. In addition, there are 2 major benefits to this approach. First, high ranking officials from each company are given an opportunity to hear both sides' arguments. Second, the executives are then able to meet and discuss

settlement without being constrained by legal remedies which assume that there will be a “winner” and a “loser”.

9. Negotiation

9.1 Negotiation involves some form of communication leading to joint decisions. The early stages involve a predominance of antagonism whilst the later stages involve (one hopes) a predominance of co-ordination and co-operation. As the parties begin to explore their differences, the information exchange that occurs may lead to a greater understanding of the situation. This may in turn eventually lead to a convergence of goals and an agreement, or alternatively the abandonment of the negotiation process. Negotiation may lead to a decision that does not in fact result in agreement, for example, the unilateral decision to end a negotiation in favour of a more formal dispute resolution technique.

9.2 There are two main approaches to negotiation. First is the "competitive" or "positional" approach. Positional negotiators will make an initial offer that is considerably less than they are ultimately willing to pay. They will raise their offers gradually and seek whatever tactical advantages are available. These tactics fall under three headings.

(a) Firstly, proprietary tactics. These involve a range of simple positional moves, for example, insisting that meetings be held in your own office or some other setting where you feel more comfortable than your adversary; attempting to ascertain the number of people the other side will bring to the meeting in order to ensure that you balance or slightly outnumber the other side; in the event that the other side requests a negotiation meeting, then demanding some sort of pre-condition which, if the other side accepts, may improve the chances of a favourable outcome. These simple tactics provide an opportunity to weigh up the negotiating clout of the adversary as well as an opportunity to put the other party at a psychological disadvantage.

(b) Secondly, initial tactics. These tactics are used in order to attempt to extract the first offer from the other side. For example, the use of silence in the hope that the other side will tender an offer in order to keep negotiations under way. A first high demand provides the negotiator with the ability to manoeuvre and reduce subsequent demands. Furthermore, unreasonable and outrageous demands appear to become more justifiable

after extended discussions. Another initial tactic involves putting your major demand first on the agenda. Many competitive negotiators believe that there is a "honeymoon" period at the outset of all negotiations during which negotiators make compromises more freely.

(c) Finally, a range of general tactics. This may simply include raising some of your demands during the course of negotiation in the hope that this will put pressure on the other side to complete the negotiations quickly before the position stiffens yet further. Another approach involves the use of two negotiators who play differing or even opposing roles: one takes a very hard line offering almost no compromise, whilst the other appears to desire compromise. Opposing parties who are unaware of such tactics frequently grasp at marginal concessions because they perceive them as substantial in relation to the position of the hard liner.

9.3 The alternative approach is that of "principled", "co-operative", "problem solving" or "win/win" negotiation. A competitive negotiator will seek to obtain as much as possible during the course of the negotiations; the principled approach recognises that there may be bargained outcomes which will advance the interests of both parties. A clear exploration of the parties' interests may provide the opportunity to maximise mutual gains, for example the ability to maintain the long term relationship between them.

10. Project Mediation/Contracted Mediation

10.1 'Contracted Mediation' or 'Project Mediation' attempts to fuse team building, dispute avoidance and dispute resolution in one procedure. A project mediation panel is appointed at the outset of the project; it is impartial and normally consists of one lawyer and one commercial expert, who are both trained mediators. The panel assists in organising, and attends, an initial meeting at the start of the project and may conduct one or more workshops at the outset or during the course of the project as necessary, to explain what project mediation is about and how it works. They may also visit the project periodically in order to have a working knowledge of the project and more importantly the individuals working on it. That knowledge allows the panel to resolve differences before they escalate, because the panel provides an immediate forum for the confidential discussion and potential mediation of differences or disputes. The parties have the right to contact the mediators informally and consult with them privately at any time

10.2 Project mediation has been defined as "*the proactive engagement at the beginning of a project of expert third party neutral mediators to support the success of the project. They do this by facilitating the resolution of issues as they arise during the project and they act as a safety net and first port of call to mediate issues that escalate into disputes with the agreement of all parties. Contracted mediation needs to be seen within an issue management framework and as an integrated part of the project process itself*"[8].

10.3 Reports of project mediation in practice are limited, as mediation is a private and confidential process. The only publicly reported project where project mediation has been used was Jersey Airport taxiway. The contract sum was approximately £15M, and the project mediation panel cost approximately £15,000. A variety of disputes were resolved and the project finished one day ahead of schedule, and approximately £800,000 below budget, with no claims. Much of the project's success has been attributed to the use of the contracted mediation process.

10.4 In project mediation, the parties to the construction contract recognise that there is a risk that they might have disputes during the course of the work but also recognise that a standing mediation panel could help to avoid those disputes. This is because the parties to the construction contract will get to know the individual mediators, and those mediators will not only have an understanding of the project, but will also know the individuals concerned. There is, therefore, the potential for the project mediation panel to become involved not just in disputes, but also in the avoidance of disputes before the parties become entrenched and turn to adjudication, arbitration or litigation. By anticipating potential differences, managing unexpected risks and seeking to prevent disputes, the mediators help to control project delivery.

10.5 Most of the structured ADR procedures such as DRBs (see paras 3.1 to 3.14 above) are only economically viable because they are used on substantial projects; this is because of the costs associated with establishing and running a three person board. However project mediation is viable for projects with a much lower contract sum, and has the potential for very widespread use; it is cheaper, less formulaic, more flexible and more informal than a DRB.

[8] Kiko Thiel, ResoLex

10.6 CEDR is preparing to launch this autumn their Model Project Mediation Protocol and Agreement, drafted with assistance from Fenwick Elliott LLP. These documents set out the ground rules, including the powers of the project mediators, and include a confidentiality agreement to ensure that all information emanating from the mediation process is not to be used for any other purpose, unless the parties agree otherwise.

15 May 2006
Victoria Russell
Fenwick Elliott LLP